Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1313

JACOB R. WARD,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, JACOB R. WARD, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 19, 1979.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit, Circuit Judges, Brown, Dravitch and Frank M. Johnson, Jr. entered their Decision on December 19, 1979.

OPINION DELIVERED IN COURT BELOW

Opinion of the United States Court of Appeals for the Fifth Circuit:

"The Taxpayer first argues that §1402(g) violates the Establishment and Free Exercise Clauses of the First Amendment. We do not reach this issue because we hold that the Taxpayer does not have standing to assert this claim. The Taxpayer states that he seeks to have this exemption declared unconstitutional. But if we so held, the exemption would be entirely void. The relief the Taxpayer really seeks, to be included within the exemption would not be ours to grant. Only Congress could amend the statute to include the Taxpayer's situation. In short, the Taxpayer has not shown that he has suffered an injury which is likely to be redressed by a favorable decision. *Simon v. Eastern Kentucky Welfare Rights Organization,* 1976, 426 U. S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450.

Taxpayer next contends §1402(g) violates the Equal Protection Clause of the Fourteenth Amendment because it denies him the same exemption as members of recognized religious sects who conscientiously object to Social Security. Of course, the Fourteenth Amendment applies only to state, and not to federal, action. *Jewell v. City of Covington,* 5 Cir. 1970, 425 F. 2d 459, cert. denied, 1970, 400 U. S. 929, 91 S. Ct. 195, 27 L. Ed 189. However, the Due Process Clause of the Fifth Amendment does provide protection against federal discriminatory action "so unjustifiable as to be violative of due process." *Bolling v. Sharpe,* 1953, 347 U. S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884, 886. See also *Shapiro*

v. Thompson, 1969, 394 U. S. 618, 642, 89 S. Ct. 1322, 1335, 22 L. Ed. 2d 600, 619; *Schneider v. Rusk,* 1964, 377 U. S. 163, 168, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218, 222. More recently, the Due Process Clause of the Fifth Amendment has been held to actually incorporate the Equal Protection Clause of the Fourteenth Amendment. *United States v. Falk,* 7 Cir. 1973, 479 F. 2d 616, 618; *United States v. Thoresen,* 9 Cir. 1970, 428 F. 2d 654, 658.

Yet §1402(g) does not arbitrarily discriminate against Taxpayer. "Neither due process nor equal protection imposes * * * any rigid rule of equality of taxation." *Carmichael v. Southern Coal and Coke Co.,* 1936, 301 U. S. 495, 509, 57 S. Ct. 868, 872, 81 L. Ed. 1245, 1253. The singling out of one class for tax exemption is justifiable in light of the Congressional purpose of accommodating the religious beliefs of those people whom they felt sure had firmly based religious convictions. H. Rep. No. 213, 89th. Cong. 1st Sess. 101 (1965-2 Cum. Bull. 739-740)."

JURISDICTION

Petitioner appeals from the judgment of the United States Court of Appeals for the Fifth Circuit decided December 19, 1979. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1), and Supreme Court Rule 19.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Section 1402 (g) of the Internal Revenue Code violates the First, Fifth and Fourteenth Amendments of the Constitution of the United States because Section 1402 (g) of the Internal Revenue Code denied Petitioner/Taxpayer the same exemption from paying and receiving Social Security exemption as members of state approved organized religious sects?

(2) Whether Section 1402 (g) of the Internal Revenue Code arbitrarily discriminates against Petitioner/Taxpayer by not accomodating the religious and conscientious beliefs of Petitioner/Taxpayer as to payment and receipts of Social Security merely because he does not belong to some state approved organized religion?

STATEMENT OF THE CASE

The Taxpayer was self-employed as a salesman for Lubrication Engineer, Inc. during the years 1973 through 1976. He paid no self-employment tax during those years. Instead, he filed a Form 4029 Application for Exemption from tax on self-employment and waiver of benefits under Internal Revenue Code Section 1402(g). This exemption is available to

members of recognized religious sects which include in their beliefs the conscientious objection to public or private insurance and which make reasonable provisions for their dependent members. In his application, Taxpayer did not certify that he was a member of any such state approved religious sect, but did state he was conscientiously opposed to payments to Social Security.

The Internal Revenue Service denied Taxpayer's application for exemption by letter dated June 27, 1977, on the grounds that "he had not established that he qualified as a duly ordained minister or as a member of a qualified religious faith under Section 1402 (g) of the Internal Revenue Code ***." The Government's position was affirmed in a memorandum decision by the United States Tax Court. The United States Court of Appeals for the Fifth Circuit affirmed the Tax Court decision.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case involves questions of gravity and general importance. This case involves principles that settlement of which is of importance to the general public, religious groups, and each religious individual who does not belong to a STATE APPROVED organized religion.

This case involves conflict between decisions involving the question of separation of State and Religion.

The United States Constitution guarantees an American citizen the right to practice and profess his religious related

conscientious beliefs in any way that does not injure society. Section 1402(g) of the Internal Revenue Code allows only members of State Approved religions that right.

This case involves the question of separation of State and Religion. The Petitioner/Taxpayer, an individual who has deep religious oriented conscientious beliefs against paying into or receiving from Social Security has less rights than an individual who belongs to a State Approved religion.

This case involves the basic issue of Equal Protection of the Laws as provided by the Fifth and Fourteenth Amendments of the Constitution of the United States. The Courts have repeatedly condemned inequality and have been so expressive and enunciative, that it is respectfully urged that a further expression of broad and demonstrative pronouncement, based on substance, rather than form, would strengthen our system of jurisprudence. It was never intended that membership or nonmembership in a church or sect be either treated with favor or be used as a penalty.

This case involves more than Congressional perogatives to single out one class of people for tax exemption to accommodate the religious beliefs of those people whom Congress felt sure had firmly based religious convictions. It involves the exclusion of individuals who have firmly based religious convictions but DO NOT BELONG TO A STATE APPROVED RELIGION.

This case does not involve the question of equality of taxation. It does involve the question of whether a State

Approved religion shall have the right to exemption to Social Security tax payments and a religious individual cannot be exempt because his religious beliefs are not State Approved. This case involves a question of separation of State and Religion and due process of law.

This is not a case that should involve whether Congress would have to rewrite the law to include the Petitioner/Taxpayer. This is a case that involves injury to the Petitioner merely because his religious beliefs are not State Approved. If the statute is found to be unconstitutional, Congress can rewrite the law to include Petitioner's religious beliefs as to Federal Social Security.

CONCLUSION AND PRAYER

The questions presented herein have broad significance to the Taxpayer, to the Internal Revenue Service and to all citizens of the United States of America.

As a fervently religious individual, a Taxpayer should not be denied the right to exemption from Social Security merely because he does not belong to a State Approved religion.

A statute, 1402(g) of the Internal Revenue Code, that allows individual American citizens, who belong to State Approved religions, the right to exemption from the Federal Social Security, but, denies the same right to a religious American citizen, who does not belong to a State Approved religion, is unconstitutional as to the exemption portion of the statute.

Section 1402(g) of the Internal Revenue Code violates the First, Fifth and Fourteenth Amendments of the Constitution of the United States because it denied Petitioner/Taxpayer, an individual who has conscientious religious beliefs against paying and receiving social security the same social security exemption as members of State Approved organized religious sects.

Section 1402(g) of the Internal Revenue Code arbitrarily discriminates against Petitioner/Taxpayer by not accommodating the religious and conscientious beliefs of Petitioner/Taxpayer as to payment and receipts of Social Security merely because he does not belong to some State Approved organized religion.

Because of the importance and broad application and significance ot the Constitutionality of the statute in question, the Petitioner prays that this Court grant a Petition of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Paul A. Butler
Butler, Boltz & Vickers, P. C.
Attorney for Petitioner
3530 Timmons Lane, #414D
Houston, Texas 77027
(713) 781-8573

PROOF OF SERVICE

The undersigned attorney of record for Petitioner, JACOB R. WARD, hereby certifies as follows:

(A) That I, Paul A. Butler, am a member of the bar of the United States Supreme Court, and that I have duly served all parties with the foregoing Petition for Writ of Certiorari as hereinafter shown:

(B) That the names and addresses of the attorneys of records for the adverse party are as follows:

The Honorable M. Carr Ferguson
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

The Honorable Jim Miller
Department of Justice
Washington, D. C. 20530

Mr. Grant W. Wiprud
Department of Justice
Washington, D. C. 20530

(C) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said M. Carr Ferguson, Jim Miller and Grant W. Wiprud, attorneys for said Respondents, by depositing same in the United States mail return receipt requested, properly addressed to said attorneys for Respondents at their said addresses.

EXECUTED, this 18th day of February, 1980.

Paul A. Butler
Butler, Boltz & Vickers, P. C.
ATTORNEYS FOR PETITIONER
3530 Timmons Lane, #414D
Houston, Texas 77027
(713) 781-8573

SWORN TO AND SUBSCRIBED TO BEFORE ME by the said PAUL A. BUTLER, Attorney for Petitioner, this 18th day of February, 1980.

Afton Jane Izen
Notary Public in and for
Harris County, Texas

My Commission Expires:

August 19, 1980

APPENDIX A - TAX COURT OPINION

T.C. Memo. 1979-39

UNITED STATES TAX COURT

JACOB R. WARD, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 9280-77. Filed January 29, 1979

Paul A. Butler, for the petitioner.

Thomas G. Norman, for the respondent.

MEMORANDUM OPINION

SCOTT, *Judge:* Respondent determined deficiencies in petitioner's income tax for the calendar years 1973, 1974, 1975 and 1976 in the amounts of $864, $1,042.80, $1,113.90 and $1,208, respectively.

The only issue for decision is whether petitioner is liable for the tax on self-employment income under sections 1401 and 1402, I.R.C. 1954, [1] for each of the years here in issue.

All of the facts have been stipulated and are found accordingly.

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1. All section references are to the Internal Revenue Code of 1954, as amended and in effect during the years here involved, unless otherwise indicated.

Petitioner, who resided in Houston, Texas, at the time of the filing of his petition and amended petition in this case, filed individual Federal income tax returns for each of the years 1973, 1974, 1975 and 1976 with the District Director of Internal Revenue, Austin, Texas.

During the years 1973 through 1976, petitioner was a self-employed salesman for Lubrication Engineer, Inc. of Ft. Worth, Texas. From this employment petitioner earned self-employment income within the meaning of section 1402(b) in the following amounts:

Taxable Year	Net Earnings
1973	$ 13,462.00
1974	18,861.03
1975	18,960.43
1976	20,319.45

These amounts were reported as income by petitioner on his Federal income tax returns for the respective years.

Petitioner paid no self-employment tax during the years 1973 through 1976. Attached to petitioner's Federal income tax return for the year 1973 is a form 4029 (Application for Exemption From Tax on Self-Employment Income and Waiver of Benefits). This form, which is unsigned, shows petitioner's name, address and social security number, and is dated March 8, 1974. Following the printed words, "I certify that I am and continuously have been a member of," on this form is the notation "N/A." This notation appears on the line above the parenthetical notation "District and location" is the following:

"(See Pending Decision - Letter)." At the bottom of the form on the line following the words, "Religious group," again appears "N/A" above the parenthetical word, "Denomination." On the following line above the parenthetical words, "Authrized spokesman," and "Title" appears the following: "(See Letter)."

On or about April 15, 1977, petitioner filed another Form 4029 (Application for Exemption From Tax on Self-Employment Income and Waiver of Benefits) with the Internal Revenue Service in Austin, Texas. On the form following the printed words, "I certify that I am and continously have been a member of," appears the statement: "the conscientiously opposed to payments to social security group" and on the line following the word, "since," appears "01 01 73." At the bottom of the page in the blank space preceding the words, "of which I am a member," appears the typewritten statement: "The conscientious group." On the following line above the parenthetical words, "Authorized spokesman, Title and Address," appears "Jacob R. Ward Chairman 1816 Elemen Apartment 12 Houston, Tx. 77011." This Form 4029 is signed by petitioner.

By letter dated June 27, 1977, from the Internal Revenue Service petitioner was informed that since he had not established that he qualified

> as a duly ordained minister or as a member of a qualified religious faith under sections 1402(e) and (g) of the Internal Revenue Code, it is determined that you are liable for self-employment tax * * *.

Petitioner has not filed with the Internal Revenue Service Form 4361, which is an application for exemption from self-employment tax for use by ministers, members of religious orders, and Christian Science practitioners.

In his notices of deficiency to petitioner for the years here in issue respondent determined deficiencies in petitioner's income tax based upon his liability for self-employment tax.

Section 1401 provides for taxes on self-employment income as defined in section 1402(b). Petitioner has stipulated that he received in each of the years here in issue self-employment income within the definition of section 1402(b). Section 1402(e) exempts from this tax ordained, commissioned, or licensed ministers, members of a religious order or Christian Science practitioners with respect to services performed as such minister, member, or practitioner upon the filing of a proper application. Petitioner makes no contention that he is entitled to an exemption within this provision. Section 1402(h), [now section 1402(g)] as in effect for the years here in issue, provides for exemption from self-employment tax of an individual who is a member of a recognized religious sect where the established tenets or teachings of such sect causes him to be conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement. A taxpayer is required to file an application for the exemption provided for in section 1402(h). This section carries further requirements, but they are not material here since petitioner specifically states he does not contend that he falls within the provisions

of section 1402(h) as applicable to the years here in issue.

Petitioner's only arguments are that section 1401 and section 1402, as applicable to him, are unconstitutional because they violate the provision of Article I of the Constitution of the United States that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and the provisions of Article XIV to the Constitution that no state shall "deprive any person of life, liberty or property without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws." [2] Petitioner argues that the provisions of sections 1401 and 1402, in effect, require a person conscientiously opposed to acceptance of the benefits of any private or public insurance, which provides for death, oldage, disability or retirement benefits, to become a member of an established sect not of his choosing and therefore constitute a law providing for the establishment of a religion or prohibiting the free exercise by an individual of his chosen religion. He argues that section 1402, which limits an exemption from self-employment tax to members of recognized religious sects, deprives a person conscientiously opposed to the acceptance and the principle of public insurance of equal protection of the laws.

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2. This case was presented fully stipulated. The stipulated facts do not show that petitioner, in fact, is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement. However, in his memorandum filed with the Court in this case petitioner states that he is (footnote 2 continued on following page)

The arguments made by petitioner in this case have been dealt with in other cases before this Court. In *Palmer v. Commissioner*, 52 T.C. 310 (1969) we stated at 313:

The income tax imposed by the Social Security Act upon both employees and the self-employment has been held to be constitutional. *Helvering v. Davis*, 301 U.S. 619 (1937); *Cain v. United States*, 211 F.2d 375 (C.A. 5, 1954). In these cases no argument was made that the tax constituted an encrochment upon the free exercise of the taxpayer's religion. Petitioners have no religious scruples against the payment of taxes. However, they resist this particular tax because their individual religious beliefs prohibit them from receiving certain benefits funded by the tax. No doubt, this circumstance results in a financial sacrifice by petitioners in order to observe their religious beliefs. But, in exercising its constitutional function and duty to provide for the general welfare, a legislature may often formulate a program which places some indirect burden on the free exercise of some religious beliefs. The Supreme Court, in *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961), stated:

(footnote 2 continued)
conscientiously opposed to such insurance even though he is not presently a registered minister or member of an established church or sect. In this memorandum petitioner states that at an early age he was licensed to preach by the Page Baptist Church, Page, Oklahoma. He further states that in 1959 he joined the United Unitarian Church and that both as a Baptist and as a Unitarian he has actively preached and expounded the Christian religion. Our decision in this case in to way rests on the absence of these factual statements in petitioner's brief from the stipulated facts in the record.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion on the citizen whose religion requires him to donate a greater amount to his church; * * * The list of legislation of this nature is nerely limitless.

Benefits under the Social Security Act, including death benefits, are not automatic; the right to them is accrued only when certain pre-conditions, including, in all instances, a filing of an application to receive the benefits, are met. 42 U.S.C. sec. 402 (e) through (i); see *Ewing v. Gardner,* 185 F.2d 781 (C.A. 6, 1950). Petitioners have not shown how the imposition of the tax forces them to violate the tenets of their religion. Consequently, we see no occasion for applying so "heroic" a remedy as declaring the Social Security Act unconstitutional. See *Cohan v. Commissioner,* 39 F.2d 540 (C.A. 2, 1930).

In the *Palmer* case, *supra,* we specifically held that the provisions of section 1402(h) were not unconstitutional because of limiting persons who might obtain exemption from the tax imposed by section 1401 to members of an established religious sect that meet the standards set forth in section 1402(h). Petitioner has made no argument not considered by us in the *Palmer* case, *supra,* and we adhere to our holding in that case.

Petitioner's contention as to the applicability of Article XIV of the Constitution is without merit since the laws here involved are Federal laws and the provisions of Article XIV on which petitioner relies relate to states. However, in *Henson*

v. Commissioner, 66 T.C. 835 (1976), we considered contentions substantially similar to those made by petitioner here with respect to the violation of his rights under the 14th Amendment. The taxpayer in the *Henson* case, *supra,* was contending that the provisions of sections 1401 and 1402 violated her Fifth Amendment rights rather than the rights guaranteed under the 14th Amendment. In the *Henson* case, *supra,* at 838, in discussing the taxpayer's argument as to violation of her rights under the Fifth Amendment, we stated at 839:

Section 1402(g) prescribes the conditions under which an individual who is "(A) a duly ordained, commissioned, or licensed minister of a church or a member of a religious order * * * or (B) a Christian Science practitioner" may obtain an exemption from self-employment tax imposed on income received *"with respect to services performed by him as such minister, member, or practitioner."* (Emphasis supplied.) This subsection was added to the Code by section 201(c) of the Social Security Amendments of 1954. In promulgating this exception the Senate Finance Committee indicated its basis for establishing the classification thereunder: an attempt to prevent interference with the well-established principle of separation of church and state. See S.Rept. No. 1987, 83d Cong., 2d Sess., 1954-2 C.B. 695, 701 (1954). A tax based on the compensation paid to a minister by his church might defeat that objective. But a tax based on petitioner's income as a bookkeeper would not constitute such an impediment. Furthermore, in *Carmichael v. Southern Coal Co.,* 301 U.S. 495 (1937), the Supreme Court said at page 509:

It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. * * * This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption; infringe no constitutional limitation.***

We find that the different requirements for exemption from tax provided for the different classifications under sections 1402(e) and (h) have a rational basis and do not arbitrarily deprive petitioner of her right to due process of law. See *Abney v. Campbell*, 206 F.2d 836 (5th Cir. 1953), cert denied 346 U.S. 924 (1954). Nor do they provide for "an establishment of religion" or interfere with petitioner's "free exercise" of her religion. See *William E. Palmer, supra*, and the Memorandum Opinions following *Palmer* cited in n. 5. [Footnote omitted.]

The argument made by petitioner with respect to his rights under the 14th Amendment to the Constitution are substantially the same as those made by the taxpayer in the *Henson* case, *supra*, with respect to her rights under the Fifth Amendment. In our view, our conclusion in *Henson v. Commissioner, supra*, disposes of petitioner's arguments here that his rights under the provisions of the 14th Amendment to the Constitution are violated.

Decision will be entered
for the respondent.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Docket No. 9280-77.

JACOB R. WARD
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court as set forth in its Memorandum Opinion filed January 29, 1979, it is

ORDERED and DECIDED: That there are deficiencies in income taxes due from the petitioner for the calendar years 1973, 1974, 1975 and 1976 as follows:

Calendar Year	Deficiencies in Income Tax
1973	$ 864.00
1974	1,042.80
1975	1,113.90
1976	1,208.00

Irene F. Scott
Judge

Entered: JAN 30, 1979

SERVED JAN 30, 1979

APPENDIX B - OPINION OF THE FIFTH CIRCUIT

In re Jacob R. WARD,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellee.

No. 79-2298
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Dec. 19, 1979.

Appeal from the Decision of The United States Tax Court

Before BROWN, KRAVITCH and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

Appellant taxpayer was self-employed as a salesman for Lubrication Engineer, Inc. during the years 1973 through 1976. He paid no self-employment tax during those years. Instead, he filed a Form 4029 Application for Exemption from Tax on Self-Employment and Waiver of Benefits. This exemption is available under the Internal Revenue Code Section

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir., 1970, 431 F.2d 409, Part 1.

1402(g) (currently codified and referred to as Section 1402 (g)). [1] This exemption is available to members of recognized

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1. (g) Members of certain religious faiths. -

(1) Exemption - Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act). Such exemption may be granted only if the application contains or is accompanied by -

(A) such evidence of such individual's membership in, and adherence to the tenets or teachings of, the sect or division thereof as the Secretary may require for purposes of determining such individuals compliance with the preceding sentence, and,

(B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person.

and only if the Secretary of Health, Education, and Welfare finds that -

(C) such sect or division thereof has the established tenets or teachings referred to in the preceding sentence,

(D) it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his judgment is reasonable in view of their general level of living, and

(E) such sect or division thereof has been in existence

religious sects which include in their beliefs the conscientious objection to public or private insurance and which make reasonable provisions for their dependent members. In his application, Taxpayer did not certify that he was a member of any such religious sect, but did state he was a member of a group "conscientiously opposed to payments to social security."

(footnote 1 continued)
at all times since December 31, 1950.
An exemption may not be granted to any individual if any benefit or other payment referred to in subparagraph (B) became payable (or, but for section 203 or 222(b) of the Social Security Act, would have become payable) at or before the time of the filing of such waiver.

(2) Time for filing applications. - For purposes of this subsection, an application must be filed on or before the return (including any extension thereof) for the first taxable year for which the individual has self-employment income (determined without regard to this subsection or subsection (c)(6), except that an application filed after such date but on or before the last day of the third calendar month following the calendar month in which the taxpayer is first notified in writing by the Secretary that a timely application for an exemption from the tax imposed by this chapter has not been filed by him shall be deemed to be filed timely.

(3) Period for which exemption effective. - An exemption granted to any individual pursuant to this subsection shall apply with respect to all taxable years beginning after December 31, 1950, except that such exemption shall not apply for any taxable year -

(A) beginning (i) before the taxable year in which such individual first met the requirements of the first sentence of paragrpah (1), or (ii) before the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which such individual is a member met the requirements of subparagraphs (C) and (D), or

(B) ending (i) after the time such individual ceases to

The Internal Revenue Service denied Taxpayer's application for exemption by letter dated June 27, 1977, on the grounds that "he had not established that he qualified as a duly ordained minister or as a member of a qualified religious faith under Sections 1402(e) [2] and (g) of the Internal Revenue Code * *." The Government's position was affirmed in a

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(footnote 1 continued)
meet the requirements of the first sentence of paragraph (1), or (ii) after the time as of which the Secretary of Health, Education, and Walfare finds that the sect or division thereof of which he is a member ceases to meet the requirements of subparagraph (C) or (D).

(4) Application by fiduciaries of survivors. - In any case where an individual who has self-employment income dies before the expiration of the time prescribed by paragraph (2) for filing an application for exemption pursuant to this subsection, such an application may be filed with respect to such individual within such time by a fiduciary acting for such individual's estate or by such individual's survivor (within the meaning of section 205(c)(1)(C) of the Social Security Act).

2. (e) Ministers, members of religious orders, and Christian Science practitioners. -

(1) Exemption. - Any individual who is (a) a duly ordained, commissioned, or licensed minister of a church or a member of a religious order (other than a member of a religious order who has taken a vow of poverty as a member of such order) or (B) a Christian Science practitioner, upon filing an application (in such form and manner, and with such official, as may be prescribed by regulations made under this chapter) together with a statement that either he is conscientiously opposed to, or because of religious principles he is opposed to, the acceptance (with respect to services performed by him as such minister, member, or practitioner) of any public insurance which makes payments in the event of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of

memorandum decision by the Tax Court. [3]

There is no question that Taxpayer is not in compliance with the language of § 1402(g). Thus, the only issues on appeal are whether this section of the Internal Revenue Code violates the First and Fourteenth Amendments, as the appellant urges. We do not believe Taxpayer's Constitutional objections are well founded, and we affirm the decision of the Tax Court.

(footnote 2 continued)
any insurance system established by the Social Security Act), shall receive an exemption from the tax imposed by this chapter with respect to services performed by him as such minister, member, or practitioner. Notwithstanding the preceding sentence, an exemption may not be granted to an individual under this section as it was in effect before its amendment in 1967.

(2) Time for filing applications. - Any individual who desires to file an application pursuant to paragraph (1) must file such application on or before whichever of the following dates is later: (A) the due date of the return (including any extension thereof) for the second taxable year for which he has net earnings from self-employment (computed without regard to subsections (c)(4) and (c)(5)) of $400 or more any part of which was derived from the performance of service described in subsection (c)(4) or (c)(5); or (b) the due date of the return (including any extension thereof) for his second taxable year ending after 1967.

(3) Effective date of exemption. - An exemption received by an individual pursuant to this subsection shall be effective for the first taxable year for which he has net earnings from self-employment (computed without regard to subsections (c)(4) and (c)(5)) of $400 or more, any part of which was derived from the performance of service described in subsection (c)(4) or (c)(5), and for all succeeding taxable years. An exemption received pursuant to this subsection shall be irrevocable.

Taxpayer did not seek to avail himself of this exemption.

3. T.C.M. 1979-39, Docket No. 9280-77.

The First Amendment Issue

[1] The Taxpayer first argues that § 1402(g) violates the Establishment and Free Exercise Clauses of the First Amendment. We do not reach this issue because we hold that the Taxpayer does not have standing to assert this claim. [4] The Taxpayer states that he seeks to have this exemption declared unconstitutional. But if we so held, the exemption would be entirely void. The relief the Taxpayer really seeks, to be included within the exemption, would not be ours to grant. Only Congress could amend the statute to include the Taxpayer's situation. In short, the Taxpayer has not shown that he has suffered an injury which is likely to be redressed by a favorable decision. *Simon v. Eastern Kentucky Welfare Rights Organization*, 1976, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450.

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4. The Eighth Circuit, unlike this Court, did not express a concern for the lack of standing, but upheld § 1402(g) in a similar fact situation in *Jaggard v. Commissioner*, 1978, 582 F.2d 1189. In doing so, the Eighth Circuit relied on two Tax Court cases of the same holding. *Henson v. Commissioner*, 1976, 66 T.C. 835, and *Palmer v. Commissioner*, 1969, 52 T.C. 310. The Eighth Circuit also found a secular legislative purpose for § 1402(g):

It represents a congressional attempt to accommodate sincerely held religious beliefs against private and public insurance programs consistent with the overall welfare purpose of the Social Security Act. Congress could reasonably conclude that individuals on their own could not be relied upon to provide for themselves in the event of dependency, but that members of a religious sect who share these views would provide for dependent members.
582 F.2d at 1190.

The Equal Protection Issue

[2] Taxpayer next contends § 1402(g) violates the Equal Protection Clause of the Fourteenth Amendment because it denies him the same exemption as members of recognized religious sects who conscientiously object to Social Security. Of course, the Fourteenth Amendment applies only to state, and not to federal action. *Jewell v. City of Covington,* 5 Cir. 1970, 425 F.2d 459, *cert. denied,* 1970, 400 U.S. 929, 91 S.Ct. 195, 27 L.Ed.2d 189. However, the Due Process Clause of the Fifth Amendment does provide protection against federal discriminatory action "so unjustifiable as to be violative of due process." *Bolling v. Sharpe,* 1953, 347, 499 74 S.Ct. 693, 694, 98 L.Ed. 884, 886. *See also Shapiro v. Thompson,* 1969, 394 U.S. 618, 642, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600, 619; *Schneider v. Rusk,* 1964, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218, 222. More recently, the Due Process Clause of the Fifth Amendment has been held to actually incorporate the Equal Protection Clause of the Fourteenth Amendment. *United States v. Falk,* 7 Cir. 1973, 479 F.2d 616, 618; *United States v. Thoresen,* 9 Cir. 1970, 428 F.2d 654, 658.

[3] Yet § 1402(g) does not arbitrarily discriminate against Taxpayer. "Neither due process nor equal protection imposes * * * any rigid rule of equality of taxation." *Carmichael v. Southern Coal and Coke Co.,* 1936, 301 U.S. 495, 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245, 1253. The singling out of one class for tax exemption is justifiable in light of the Congressional purpose of accommodating the religious beliefs of those

people whom they felt sure had firmly based religious convictions. H.Rep. No. 213, 89th Cong. 1st Sess. 101 (1965 - 2 Cum Bull. 739 - 740).

AFFIRMED.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1313

In the Supreme Court of the United States

OCTOBER TERM, 1979

JACOB R. WARD, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the decision below holding (1) that he lacked standing to challenge the constitutionality of the exemption from self-employment tax granted by Section 1402(g)[1] of the Internal Revenue Code of 1954 (26 U.S.C.), and (2) that the denial of such an exemption under the circumstances of this case does not violate his rights under either the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment.

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[1]During the period to which the self-employment taxes here in issue relate (1973-1976), the provisions referred to in the petition as Section 1402(g) of the Code were actually set forth in Subsection (h). These provisions were redesignated as Subsection (g), effective for 1977 and later years, by Section 1901(a)(155)(B) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1789. In order to avoid confusion, we will follow petitioner's practice of referring to the provision as Section 1402(g).

During the period 1973-1976, petitioner was self-employed as a salesman and earned a total of $71,603 in income from self-employment within the meaning of Section 1402(b) of the Code (Pet. App. A 13; Pet. App. B 22). He did not, however, pay any self-employment tax during those years. Instead, he filed a Form 4029 (Application for Exemption from Tax on Self-Employment Income and Waiver of Benefits) on which he stated that he was a member of a group "conscientiously opposed to payments to social security" (Pet. App. B 22-24).

The Commissioner of Internal Revenue denied petitioner's application for exemption on the ground that "he had not established that he qualified as a duly ordained minister or as a member of a qualified religious faith under Sections 1402(e) and (g) of the Internal Revenue Code"[2] (Pet. App. B 25). Accordingly, he issued

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[2]Section 1402(e) of the Code provides that duly ordained, commissioned, or licensed ministers, members of religious orders, and Christian Science practitioners, who are opposed on grounds of conscience or religious principle to any form of public insurance (including social security) which makes payments in the event of death, disability, old age, retirement, or for medical care, are exempted from the imposition of the self-employment tax with respect to income from services performed as such minister, member of a religious order, or Christian Science practitioner.

Section 1402(g) (formerly Section 1402(h)—see note 1, *supra*) provides a further exemption for members of recognized religious sects who, by reason of adherence to the established tenets or teachings of such sect, conscientiously oppose acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old age or retirement, or for medical care. As a further condition of this exemption, the Secretary of Health, Education, and Welfare must determine that the sect has an established practice of reasonably providing for its dependent members.

notices of deficiency asserting liability for the unpaid self-employment taxes on petitioner's income from self-employment for these years. Petitioner contested these deficiencies in the Tax Court, which upheld the Commissioner's determinations (Pet. App. A 12-21). The court of appeals affirmed (Pet. App. B 22-29).

1. The decision below correctly held that petitioner could not challenge the constitutionality of Section 1402(g) under the Establishment and Free Exercise Clauses of the First Amendment.[3] The jurisdiction of the Tax Court is limited to determining the amount of the deficiency (or overpayment) with respect to the particular taxes in issue. Petitioner makes no claim that his income for the period was not income from self-employment within the meaning of Section 1402(b), or that he actually qualifies for any exemption provided by law from the tax imposed on such income by Section 1401(a) of the Code. The Tax Court therefore correctly sustained the deficiencies in question, without regard to whether the exemption is properly conferred on those individuals who do fall within the terms of Section 1402(g). See *Kirk* v. *Commissioner*, 425 F. 2d 492 (D.C. Cir.), cert. denied, 400 U.S. 853 (1970). Since petitioner's own tax liability would not be affected by a determination as to the constitutionality of the exemption provisions in question, he had no standing to challenge their constitutionality in this proceeding. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37-39 (1976).

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[3]Petitioner has not challenged the constitutionality of Section 1402(e) in this case.

2. Even on the assumption that petitioner could avoid his own liability for the self-employment taxes in question on the basis of his First Amendment objections to the exemption granted by Section 1402(g), the Tax Court correctly concluded (Pet. App. A 16-20) that these provisions violate neither the Free Exercise Clause nor the Establishment Clause of the First Amendment. Accord: *Jaggard* v. *Commissioner*, 582 F. 2d 1189 (8th Cir. 1978), cert. denied, 440 U.S. 913 (1979); *Hatcher* v. *Commissioner*, 37 T.C.M. 304 (1978), affirmed by unpublished opinion, No. 78-1883 (10th Cir. July 27, 1979), cert. denied, No. 79-5692 (Feb. 19, 1980); *Lerner* v. *Commissioner*, 34 T.C.M. 331 (1975), affirmed by unpublished order, No. 75-1770 (3d Cir. Jan 13, 1976); *Henson* v. *Commissioner*, 66 T.C. 835 (1976); *Palmer* v. *Commissioner*, 52 T.C. 310 (1969). The granting of this exemption to others in no way impairs petitioner's free exercise of his own religious beliefs. Moreover, notwithstanding its limitation to members of certain narrowly defined religious sects (see *Wisconsin* v. *Yoder*, 406 U.S. 205, 221-223, n. 11 (1972)), the courts have also uniformly concluded that Section 1402(g) does not violate the Establishment Clause since its purpose is "neither the advancement nor the inhibition of religions." *Jaggard* v. *Commissioner*, *supra*, 582 F. 2d at 1190. Rather, as the Eighth Circuit noted in *Jaggard* (*ibid.*):

> It represents a congressional attempt to accomodate sincerely held religious beliefs against private and public insurance programs consistent with the overall welfare purpose of the Social Security Act. Congress could reasonably conclude that individuals on their own could not be relied upon to provide for themselves in the event of dependency, but that members of a religious sect who share these views would provide for dependent members.

3. Finally, the court below correctly held that Section 1402(g) does not arbitrarily discriminate against petitioner. "Neither due process nor equal protection imposes * * * any rigid rule of equality of taxation." *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 509 (1937). The legislative classification for tax exemption here is permissible in light of the congressional purpose of accomodating the religious beliefs of those who have firmly based religious convictions against the acceptance of benefits such as those provided by the Social Security Act and who, at the same time, are members of groups having a long-established practice of adequately providing for their dependent members.[4] *Jaggard* v. *Commissioner*, *supra*; H.R. Rep. No. 213, 89th Cong. 1st Sess. 101 (1965).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

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[4]Indeed, even on the assumption that the Constitution requires this exemption to be extended to members of secular groups that similarly provide for their own dependent members, petitioner did not allege that he was, in fact, a member of any such group. Accordingly, the alleged sincerity of his conscientious objection to public insurance would not in itself qualify him, in any event, for the exemption.

DOJ-1980-04